IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MRS. JUSTICE K.HEMA

FRIDAY, THE 21ST JULY 2006 / 30TH ASHADHA,1928

CRL.A.No. 289 of 2004()

SC.292/2002 of ADDITIONAL SESSIONS COURT (ADHOC)-II, KOLLAM
CP.124/2001 of JUDL.MAGISTRATE OF FIRST CLASS-I, KOTTARAKKARA

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APPELLANT: ACCUSED

GEORGE S/O. CHACKO, C.7839,
CENTRAL PRISON, THIRUVANANTHAPURAM.

BY ADV. SRI.PRAMODH J.DEV (STATE BRIEF)

RESPONDENTS: COMPLAINANT

STATE OF KERALA

BY PUBLIC PROSECUTOR SRI.K.J.GEORGE

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 21/07/2006, THE COURT ON 21/07/2006 DELIVERED THE FOLLOWING:

K.HEMA, J.

CRL.A.NO. 289 of 2004

Dated this the 21st day of July, 2006

JUDGMENT

Appellant is convicted and sentenced for offence under Section 55(a)of the Abkari Act ('the Act', for short) to undergo rigorous imprisonment for four years and to pay a fine of Rs.1,00,000/- and in default of payment of fine to undergo simple imprisonment for one year. The said conviction and sentence are challenged in this appeal.

2. According to prosecution, PW4, Assistant Sub Inspector of Police got reliable information that accused 1 to 3 were selling arrack from the garden land of one George. They proceeded to the said place while three persons found standing there. One of them was carrying a glass and a bottle. The other one was holding a black can. The third one was standing close to them. On seeing the police party, all of them ran away abandoning the articles. The person who was standing nearby is the appellant herein. He is the third accused.

3. According to prosecution, on inspection of the spot, they found that a white can having capacity of 35 litres which contain

spirit and the can and the glass also contained arrack. Samples were drawn from the articles and those were sent for chemical analysis. On analysis, those were found to be liquor. The prosecution case is that the appellant-third accused was in possession of the white can containing spirit. The said can is marked as MO2. The appellant was charge sheeted for offence under Section 55(a) of the Act on allegation that he was in possession of the said can which was found nearby. A mahazar was prepared and articles were seized and after the formalities, a case was registered against the accused.

4. The prosecution examined Pws 1 to 5 and marked Exhibits P1 to P5 and Mos 1 to 5 series. The appellant marked Exhibits D1 and D2 on his side. After analysing the evidence, the court below found that though the third respondent-third accused was not actually carrying MO2, his dominion control over MO2 is evident from the evidence on record. Relying upon a decision of the Supreme Court referred to in the judgment it was held that the term “possession” would imply dominion and control. The court below was of opinion that it is not necessary that the contraband must be found in the personal possession of the accused or his house. The court found that the presence of the accused in the scene of occurrence and possession of MO2 was proved by the

prosecution beyond the shadow of reasonable doubt. On these premises the appellant was convicted and sentenced for offence under Section 55(a) of the Abkari Act.

5. The appellant was undefended and he is in custody. Hence Adv.Sri.Pramodh.J.Dev was appointed as State Brief. Learned counsel for the appellant vehemently contended that the appellant cannot be held guilty for offence under Section 55(a) of the Act, since the prosecution has failed to prove that he was in possession of MO2, can which allegedly contained spirit. Before considering the meaning and import of the term expressed 'possession' in law, I shall consider the evidence in detail. Pws 2 to 4 are the official witnesses who have allegedly seen the accused “in possession” of MO2. Pws 1 to 4 gave evidence in detail. But their evidence are not consistent with each other.

6. The evidence of PW1 will not disclose that the appellant had any connection with MO2 at all. He did not speak in the chief examination that the accused was found standing near the contraband article. He did not mention anything about the third accused at all, having anything to do with the article seized in this case. In the chief examination he only said that three persons were found standing in the property, out of which, two of them were carrying some articles. No mention is made in the chief

examination about the involvement of the appellant, except by saying that a "person" was found standing. His evidence will not disclose any incriminating evidence against the appellant. His evidence will not reveal any fact from which it can be inferred that the appellant was in possession of MO2. In the cross-examination he made clear that when he saw the third accused, he had not seen anything in his hand.

7. PW4 is the Assistant Sub Inspector of Police. Even though he has several reasons to implicate the appellant, he did not state that the appellant was found in possession of any of the contraband articles. Therefore, the evidence of PW4 is of no help to prove that the third accused was in possession of MO2. Now coming to the evidence of PW3 it can be seen that in the chief-examination he deposed that on reaching the spot, he found the first accused standing with a plastic bottle and a glass and the second accused carrying a black can and the third accused standing close by. He did not state that the third accused had anything to do with the material objection. His evidence will also not reveal that the third accused had any connection with MO2 seized from the place of occurrence. In what manner the appellant was in possession of any contraband article, has not been spoken to by PW3. He did not even say that MO2 was found atleast in close proximity to the appellant.

His evidence is totally silent about the possession of MO2 by the appellant.

8. The only evidence which remains is that of PW2 to support the prosecution case. He deposed that when he reached the place of occurrence, he found three persons standing. One of them was carrying a bottle and a glass, the other was carrying a black can. These persons were identified as accused 1 and 2. He stated that near to them, another person was standing and he was identified as the appellant. He deposed that close to the appellant, a white can was also found. He identified MO2 as the can which was kept close to the appellant. Except the evidence of PW2, there is nothing on record to show that the third accused had any connection with MO2.

9. PW2 is an official witness. He is the sole witness who identified appellant and gave incriminating evidence against him. On the basis of solitary evidence of an official witness, it may not be proper to enter a conviction against an accused, especially when it is not uncorroborated by evidence of atleast the other official witnesses. It has to be borne in mind that PW4 is the detecting officer who is most interested in the success of the prosecution. But, he himself does not implicate the third accused in clear and cogent terms with MO2. The evidence of PW3 is also not of much

and to support the version given by PW2. Therefore, in the absence of corroboration, even by the evidence of official witnesses, it may not be safe to convict an accused in an offence of this nature, based on the sole testimony of PW2. This is a case where the evidence of a police official is uncorroborated by not only independent evidence, but by the evidence of official witnesses themselves.

10. The court below has lost sight of the fact that there is no corroboration to the evidence of PW2 with respect to involvement of the appellant even from the official witnesses. Even if the evidence of PW2 is accepted, there is nothing to show that the appellant had the knowledge of the existence of the contraband in the said premises. The evidence in this case only discloses that he was found standing near accused 1 and 2. But the mere presence of the accused close to the co-accused or his running away by itself may not be sufficient, in the absence of satisfactory evidence to show that the accused had some dominion or control over the contraband article. In such circumstances, I find that prosecution has failed to prove the offence against appellant.

In the result, the conviction and sentence passed against the appellant under Section 55(a) of the Abkari Act are set aside. The appellant is found not guilty of offence under Section 55(a) of the Abkari Act and he is acquitted of the said offence. He is set at

liberty forthwith. If the appellant is still in custody, he shall be released forthwith. Issue release memo to the jail authorities concerned immediately.

Appeal is allowed.

K.HEMA, JUDGE

vgs.

K.HEMA, J.

CRL.A.NO.289 OF 2004

JUDGMENT

21.7.2006